

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Fees for Ancillary or Supplementary ) MM Docket No. 97-247  
Uses of Digital Television Spectrum )  
Pursuant to Section 336(e)(1) of the )  
Telecommunications Act of 1996 )  
  
To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

**OPPOSITION OF HOME SHOPPING NETWORK, INC.  
AND VALUEVISION INTERNATIONAL, INC.**

Home Shopping Network, Inc. ("HSNi") and ValueVision International, Inc. ("ValueVision"), pursuant to Section 1.429(f) of the Commission's Rules, hereby oppose the Petition for Reconsideration filed in the above-captioned proceeding on January 15, 1999 (the "Petition") by The Office of Communication of the United Church of Christ, *et al.* ("UCC").

UCC challenges the Commission's conclusion in its *Report and Order*, FCC 98-303 (Nov. 19, 1998) (the "*Report and Order*"), that free, over-the-air broadcast shopping programming is not an "ancillary or supplementary" service within the contemplation of Section 201 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 336(e)(1)(B), and therefore is not subject to spectrum fees. However, as HSNi and ValueVision previously have demonstrated, *see* joint Reply Comments of ValueVision International, Inc. and Home Shopping Network, Inc. (Aug. 3, 1998) (the "Reply Comments"), and as the Commission has recognized,

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UCC's position is contrary to the plain language of the Act, its legislative history, and Commission precedent and policy. In addition, its Petition offers no new basis that would justify revisions to the Commission's prior reasoned decision.

Accordingly, the Petition should be denied.

UCC's argument proceeds from a false premise, to wit, that the Act directs the Commission to impose fees on certain free, over-the-air broadcast services. But UCC's Petition, like its earlier Comments, is bereft of any support for this proposition. To the contrary, as HSNi and ValueVision demonstrated in their joint Reply Comments, the language and legislative history of the Act make clear that, in directing the Commission to assess a spectrum fee on "ancillary and supplementary" services, Congress did not intend that traditional -- or, to use the Commission's parlance in the *Report and Order*, "existing" -- free, over-the-air broadcast formats, including televised shopping programming, should be subject to such a fee. *See* Reply Comments at 3-6.

Contrary to UCC's assertion (*see* Petition at 2), but as the Commission acknowledges, the Act does *not* define "ancillary or supplementary" services. *See Report and Order* at ¶ 31. Rather, Section 336(e)(1) only delineates the circumstances under which such services may be subject to a fee. But the Act's specific instruction that fees were to be assessed only on "ancillary and supplementary" digital services was arrived at in the context of the Commission's contemporaneous consideration of rules and policies related to the implementation of digital television, in which the Commission repeatedly and consistently made

clear that “ancillary and supplementary” services are separate and distinct from existing, traditional over-the-air broadcast services.

Thus, for example, prior to enactment of legislation, the Commission referred to “ancillary and supplementary” uses of digital spectrum as “uses *other than free, over-the-air broadcasting*.” *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, “In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service,” 10 FCC Rcd 10540, 10544 n.23 (1995) (emphasis added). Thereafter, the Commission reiterated that the term “ancillary and supplementary” services includes “any service provided on the digital channel other than free, over-the-air services.” *Fifth Report and Order*, “In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service,” 12 FCC Rcd 12806, 12821 (1997) (“*Fifth Report and Order*”) (emphasis added). See also *id.* (distinguishing between “the required free service” -- *i.e.*, the *existing* free, over-the-air service that broadcasters will be required to provide following the conversion to DTV -- and any “ancillary and supplementary” services that broadcasters may elect to provide using their excess digital capacity). Concurrently, in considering the spectrum fee issue, Congress itself similarly distinguished between “ancillary and supplementary” services, on the one hand, and “the main channel signal,” on the other. See H.R. Report 104-458, 104th Cong., 2d Sess. (1996) at 160. See also 47 U.S.C. § 336(b)(2) (limiting the transmission of ancillary or supplementary services “so as to avoid derogation of any advanced television services that the Commission may require” --

e.g., the delivery of at least one free, over-the-air broadcast service as mandated in the *Fifth Report and Order*.)

Read against this backdrop, Section 336's mandate that a fee be assessed on "ancillary or supplementary" services clearly refers only to services that may be provided by a broadcaster on its excess digital capacity wholly apart from its free, over-the-air program service. Consistent with the Congressional directive, the rules ultimately adopted by the Commission for the implementation of digital television expressly provide that "any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary." 47 C.F.R. § 73.624(c). *See also Report and Order* at ¶ 37 ("over-the-air video programming provided at no charge to viewers is not an ancillary or supplementary service"). Meanwhile, in enumerating the sorts of "ancillary and supplementary" services that broadcasters may provide over their digital spectrum, the DTV rules include as illustrative examples services that are wholly different in kind from existing over-the-air broadcasting: "computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [or] subscription video." 47 C.F.R. § 73.624(c).

Given the demonstrably clear intent of both Congress and the Commission to exclude free, over-the-air broadcasting from the ambit of "ancillary and supplementary" services, UCC's insistence that televised shopping services be subject to spectrum fees can only be regarded as a misguided attempt to relitigate questions disposed of years ago in proceedings concerning electronic retail stations.

*See, e.g., Revision of Programming and Commercialization Policies*, 98 F.C.C.2d 1075, 1102 (1984) (permitting the introduction of televised shopping formats), *recon. denied*, 104 F.C.C.2d 357 (1986), *rev'd in part on other grounds, Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5321, 5326-27 (1993) ("*Cable Act Implementation Order*") (finding that television shopping stations serve the public interest and qualify as local commercial television stations for purposes of must carry). Indeed, under UCC's logic, all the affiliates of the ABC, CBS and NBC broadcast television networks arguably would be subject to fees for their free, over-the-air broadcast services because they receive compensation from their networks for airing network programming. Moreover, the relief sought by UCC -- that the Commission impose fees on the over-the-air broadcast services of some, but not other, licensees based solely on program format -- would raise serious, and insurmountable, constitutional issues. *See Cable Act Implementation Order*, 8 FCC Rcd at 5329 (determination of eligibility for must carry may not be based "upon [the stations'] programming decisions").

The term, "ancillary and supplementary" services, refers to new service offerings on the excess digital capacity that will be available to broadcasters following the conversion to DTV -- services that will be offered in addition to, and separate from, the free-over-the-air service that broadcasters are required to provide by the Commission's DTV rules. Just as clearly, the language of the Act, its

legislative history, and contemporaneous Commission decisions all establish that free, over-the-air broadcast services are beyond the scope of the spectrum fee requirements of Section 336. Accordingly, for each of these reasons, UCC's Petition should be denied.

Respectfully submitted,

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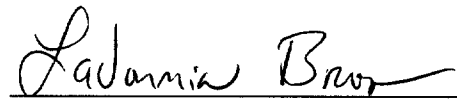
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February 22, 1999

## CERTIFICATE OF SERVICE

I, LaVonnia Brown, do hereby certify that on this 22nd day of February, 1999, copies of the foregoing "Opposition of Home Shopping Network, Inc. and Valuevision International, Inc." were delivered by first class mail to the following:

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A handwritten signature in cursive script, reading "LaVonnia Brown", written over a horizontal line.

LaVonnia Brown